Supreme Court, U.S.
FILED
OCT 22 2009
OFFICE OF THE CLERK

(3)

No. 08-1500

In The Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

DAVID A. BILLIONS*
JEANA M. LITTRELL
FEDERAL EXPRESS CORPORATION
LEGAL DEPARTMENT, LITIGATION
3620 HACKS CROSS ROAD
THIRD FLOOR, BUILDING B
MEMPHIS, TN 38125-8800
(901) 434-8533

* *Counsel of Record*

Counsel for Petitioner

October 22, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

A. Respondent Concedes the Ninth Circuit's Decision Represents an Unprecedented Expansion of EEOC Power. 1

B. The Fifth and Ninth Circuit Split on the Underlying Issue is Live and Substantial. . 3

C. Both Issues Presented in the Petition Necessitate Review. 4

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

EEOC v. Federal Express Corp.,
543 F.3d 531 (9th Cir. 2009) 2

EEOC v. Hearst Corp.,
103 F.3d 462 (5th Cir. 1997) 2, 3, 4

EEOC v. Huttig Sash & Door Co.,
511 F.2d 453 (5th Cir. 1975) 2

EEOC v. Ocean City Police Dept.,
820 F.2d 1378 (4th Cir. 1987) (en banc), *vacated on other grounds*, 486 U.S 1019 (1988) 4, 5

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984) 3

FEC v. Machinists Non-Partisan Political League,
655 F.2d 380 (D.C. Cir. 1981) 4

FTC v. Ken Roberts Co.,
276 F.3d 583 (D.C. Cir. 2001) 4

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 5

Occidental Life Ins. Co. of California v. EEOC,
432 U.S. 355 (1977) 5

United States v. Mendenhall,
446 U.S. 544 (1980) 5

United States v. Morton Salt Co.,
338 U.S. 632 (1950) 4

OTHER

Brief *Amici Curiae* of the EEAC and U.S. Chamber of Commerce, *EEOC v. Federal Express Corp.*, 543 F.3d 531 (9th Cir. 2009) (06-16864) 2

REPLY BRIEF FOR THE PETITIONER

A. Respondent Concedes the Ninth Circuit's Decision Represents an Unprecedented Expansion of EEOC Power.

Respondent concedes FedEx's central argument by failing to address it.[1] As demonstrated in the petition, the Ninth Circuit's decision empowering the EEOC to indefinitely revive or perpetuate the investigation of a charge, effectively gives the EEOC the very plenary powers Congress deliberately withheld in passing Title VII. Pet. 7-12 & 17-18. If the Ninth Circuit's decision is not reviewed and reversed, there will be fewer settlements of employment discrimination cases and increased litigation costs because the EEOC will be able to continue or revive the investigation of any charge even though the charging party has exercised its right to request the right-to-sue, has filed suit, and has entered into a court-approved consent decree that addresses all individual and class claims raised in the

---

[1] Respondent misconstrues the factual record by representing that "Merritt was denied consideration for a management position because he failed the Basic Skills Test (BST), . . ." Opp. 3-4. Passage of the BST however was never a prerequisite for promotion to management, but instead was necessary for selection to the hourly, non-management positions of courier, ramp transport driver, and customer service agent. Pet. App. 132a. The BST tested an employee's basic listening, sorting and map reading skills rather than his readiness for promotion to management. Merritt did not apply for a management position, nor did he allege in his charges that he was denied consideration for a management position because of his inability to pass the BST. R.11, Ex.'s 1 & 2.

charge.[2] *See* Brief *Amici Curiae* of the EEAC and U.S. Chamber of Commerce at 11-16, *EEOC v. Federal Express Corp.*, 543 F.3d 531 (9th Cir. 2009) (06-16864). Even after the EEOC decides to intervene in the charging party's lawsuit or file its own action, it may circumvent the court's discovery rulings by seeking the same information from the employer via administrative subpoena, which as demonstrated in the petition, affords the EEOC much greater latitude in obtaining information than what is permitted under the *Federal Rules of Civil Procedure*. Pet. 10-11.

This perhaps unintended yet clear consequence of the Ninth Circuit's decision, which respondent makes

---

[2] As evidenced by the EEOC's position in this case, the ramifications extend beyond the Ninth Circuit. The charge at issue in this case was filed by Merritt on behalf of himself and the employees of FedEx's Western Region, yet the EEOC is pursuing the investigation of Merritt's charge as a nationwide claim on behalf of employees outside FedEx's Western Region, beyond the states within the jurisdiction of the Ninth Circuit. Respondent contends that *Hearst* was "in tension" with the Fifth Circuit's earlier decision in *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975), which examined whether the EEOC should be allowed to bring suit when its investigation of a charge discloses illegal practices other than those listed in the charge. The Fifth Circuit concluded that "although the termination of the aggrieved person's suit does not cut off the EEOC's right to bring suit to end practices discovered through the investigation of the charge filed by that person, *the EEOC would be barred from filing suit on that particular charge* and on behalf of that [charging party]. *Res judicata would prevent such a suit.*" *Huttig Sash*, 511 F.2d at 456 (emphasis added). *Hearst* is not "in tension" with *Huttig Sash*. On the contrary, *Hearst* provides the mechanism, a Commissioner's charge, by which the EEOC can pursue the *Huttig Sash* holding. *EEOC v. Hearst Corp.*, 103 F.3d 462, 470 (5th Cir. 1997).

no effort to dispute in its opposition, has significant potential to disrupt the orderly and timely resolution of Title VII claims. For these reasons, the Court should review this issue.

B. The Fifth and Ninth Circuit Split on the Underlying Issue is Live and Substantial.

While conceding the Fifth Circuit in *Hearst* reached an entirely different conclusion than the Ninth Circuit in this case regarding the EEOC's authority to continue investigating after the charging party files suit, respondent attempts to minimize this split by citing the Ninth Circuit's incorrect conclusion that the Fifth Circuit based the *Hearst* decision on the wrong standard of review. Opp. 11-12.

The *Hearst* court, however, reviewed the subpoena using the same principles and reasoning embodied in the Ninth Circuit's "plainly lacks jurisdiction" standard. *Hearst* analyzed the jurisdictional issue under *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984) which recognized that "'the existence of a valid charge is a *jurisdictional* prerequisite to judicial enforcement of a subpoena issued by the EEOC.'" *Hearst*, 103 F.3d at 464 (citing *Shell Oil Co.*, 466 U.S. at 65) (emphasis added). Applying this standard, *Hearst* concluded it was obligated to determine as a threshold matter whether a Title VII charge upon which litigation had commenced could continue to provide a jurisdictional basis for an administrative investigation by the EEOC. *Id.* The court properly held that under the distinct and sequential enforcement provisions of Title VII, the EEOC no longer retains jurisdiction to investigate a charge once the charging party elects to file suit because the purpose of the investigation -- to

determine whether reasonable cause supports the allegations -- is no longer served. *Id.* at 469.

This initial determination of whether the agency has jurisdiction to issue an investigatory subpoena is the same analysis required under the standard of review urged by the Ninth Circuit. Generally, in a subpoena enforcement proceeding the court's role is sharply limited, *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378, 1379 (4th Cir. 1987) (en banc); however this role is neither "minor nor ministerial," *FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001), nor is the court "merely a rubber stamp" for enforcement. *Ocean City*, 820 F.2d at 1379. The court initially must "assure itself that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency," *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386 (D.C. Cir. 1981), and may only enforce a subpoena where "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Thus, as an initial matter, the court must determine whether the agency has statutory jurisdiction to issue the subpoena, which is exactly what the court did in *Hearst*. As the Fifth and Ninth Circuits effectively reviewed the subpoenas at issue under the same standard, respondent's contention that a live split may not exist (Opp. 12), is without merit.

C. Both Issues Presented in the Petition Necessitate Review.

Respondent briefly argues that because the Ninth Circuit declined to decide whether the EEOC may

institute a direct action after the charging party sues, it would be inappropriate for this Court to review that question. Opp. 9. To the contrary, the Court should review this issue because a "determination of th[is] question is essential to the correct disposition of the other issue[] in the case, . . ." *United States v. Mendenhall*, 446 U.S. 544, 551-552, n. 5 (1980) (overruled on other grounds) (Court considered argument on merits of issue not presented in the petition or argued at the district or court of appeals because it was "fairly comprised" by questions set out in petition).

The purpose of the investigatory stage is to determine whether reasonable cause supports the claims, *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 359 (1977), in order to prepare the EEOC for action against the employer. *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378, 1380 (4th Cir. 1987) *vacated on other grounds*, 486 U.S 1019 (1988). If the EEOC is precluded from pursuing an action on a particular charge, there is no statutory purpose for the investigation. The two issues presented in the petition are inextricably intertwined and because the second issue is "fairly included" in the first issue, review of both questions is appropriate and necessary. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379-380 (1995).

CONCLUSION

This case provides an important opportunity for the Court to resolve the conflicts among the Circuits regarding the EEOC's authority under Title VII to investigate and enforce charges of discrimination. Without guidance on these important federal

questions, the EEOC will retain perpetual jurisdiction to investigate and enforce a charge even after the charging party resolves all claims through litigation and the EEOC has foregone the opportunity to intervene.[3] This result not only exceeds the scope of Title VII but has significant potential to disrupt the timely and orderly resolution of future charges. For these reasons as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully Submitted,

David A. Billions*
Federal Express Corporation
Legal Department, Litigation
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125-8800
(901) 434-8533

Jeana M. Littrell
Federal Express Corporation
Legal Department, Litigation
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125-8800
(901) 434-8561

**Counsel of Record*
Counsel for Petitioner
Federal Express Corporation

---

[3] In opposition, respondent acknowledges through its silence that the Ninth Circuit's ruling empowers the EEOC to investigate a charge without any temporal limitation.